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No. 88-516

In The

Supreme Court of the United States

October Term, 1988

LIBERTY NATIONAL BANK AND TRUST COMPANY,

Petitioner,

v.

STATE OF NORTH DAKOTA,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of North Dakota

BRIEF OF THE AMICUS CURIAE NORTH DAKOTA BANKERS ASSOCIATION IN SUPPORT OF THE PETITIONER

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the court below correctly decided that 12 U.S.C. §29, the provision of the National Bank Act of 1864, 12 U.S.C. §§21 et seq., which establishes the allowable period for national banks to hold real estate acquired in satisfaction of debts previously contracted, does not pre-empt provisions of the North Dakota corporate farming law, N.D. Cent. Code ch. 10-06, which establish a different holding period for national banks in North Dakota with respect to ranchland and farmland acquired in satisfaction of debts previously contracted.

2. Whether this case satisfies the "capable of repetition, yet evading review" standard, and therefore may be accepted by this Court for resolution on the merits.

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INTEREST OF THE AMICUS CURIAE

The North Dakota Bankers Association respectfully submits this brief as *amicus curiae* to urge the Court to grant the petition for a writ of certiorari to review a decision of the Supreme Court of the State of North Dakota. In that decision, the court reversed an order of the North Dakota district court dismissing the divestiture

action by the State of North Dakota against Liberty National Bank and Trust Company.

The North Dakota Bankers Association is the principal trade association of the commercial banking industry in North Dakota, representing 155 out of the 160 commercial banks in the state. NDBA member banks are located in all counties with commercial banks in the state of North Dakota and include banks chartered by the Comptroller of the Currency ("national banks") and those chartered by the State Banking Board. The Liberty National Bank & Trust Company is a member of the North Dakota Bankers Association. The North Dakota Bankers Association occasionally appears in litigation affecting the interests of the banking community as a whole.

Commercial banks are extensively involved in lending to residents and business and agriculture enterprises in the state of North Dakota. In addition to direct loans for agricultural purposes for purchase of real estate, purchase of livestock, and production of crops and other farm products, banks participate with other lenders, including agencies of the U.S. Government, in making further loans. Should the state of North Dakota prevail in this appeal, there will be an effect on those North Dakota banks holding farmland by virtue of foreclosure or deed in lieu of foreclosure. This will result in a definite effect on the lending practices of every bank. Just what form or magnitude this would be is unknown at this time, but could include a tightening of credit or an increase in the cost of credit. Longer range, the potential effect on state

regulation of national banks, rather than by the Comptroller of the Currency, is a threat to the dual banking system.

Participation in this action by the industry most directly affected by determination of the issues raised by the Petitioner can provide the court with a broader perspective than that which will be provided by the parties to the litigation. Accordingly, the North Dakota Bankers Association, with the consent of the parties, filed herewith, respectfully submits this brief as *amicus curiae* in order to represent the interests of its members.

SUMMARY OF ARGUMENT

The reasons for granting a writ of certiorari in this case are well set forth in the Petition. The decision of the North Dakota Supreme Court appears to ignore decisions of this Court and those of other courts regarding pre-emption of state law to the extent that it actually conflicts with federal law. The North Dakota Court appears to have wanted to reach a desired result – upholding state law as paramount – and disregarded case law in actually reaching that result. This pre-emption question should be decided by this Court; the decision below has the potential to reach far beyond the facts of this case.

ARGUMENT

The primary issue in this case concerns an apparent conflict between Section 10-06-13(5) of the North Dakota

Century Code and 12 U.S.C. §29. This conflict raises the question of which of these statutes applies to a national bank in North Dakota. The answer to this question will decide the case.

N.D.C.C. 10-06-13(5) is part of North Dakota's corporate farming law, more appropriately called an anti-corporate farming law, and provides:

> "Unless retention of the farmland or ranchland is permitted under subsection 6 or 7, all farmland or ranchland acquired as security for indebtedness, in the collection of debts, or by the enforcement of a lien or claim shall be disposed of within three years after acquiring ownership, if the acquisition would otherwise violate this chapter."

The part of the National Bank Act relied on by the Petitioner (hereinafter "the Bank") is set out in 12 U.S.C. §29:

> . . .
>
> "But no such association shall hold the possession of any real estate under mortgage, or the title and possession of any real estate purchased to secure any debts due to it, for a longer period than five years except as otherwise provided in this section.
>
> "For real estate in the possession of a national banking association upon application by the association, the Comptroller of the Currency may approve the possession of any such real estate by such association for a period longer than five years, but not to exceed an additional five years, if (1) the association has made a good faith attempt to dispose of the real estate within the five-year period or (2) disposal within the five-year period would be detrimental to the association. . . ."

In determining which of these laws applies, it is necessary to go back to the source of power for the U.S.

Government and Congress, the United States Constitution. Article VI, clause 2, commonly called the "supremacy clause", provides:

> "This Constitution, and the laws of the United States which shall be made in pursuance thereof and all treaties made or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding."

12 U.S.C. §29 and N.D.C.C. 10-06-13(5) must be looked at in this context.

Congress passed the National Bank Act in 1864, many years before the 1932 initiated measure prohibiting corporation farming and holding of farmland in North Dakota. This shows that Congress has long been concerned about national banks holding real estate. The State of North Dakota has expressed similar concerns, found in N.D.C.C. 6-03-9, the predecessor of which was passed by the first North Dakota Legislative Assembly in 1890. This statute is similar to 12 U.S.C. §29, but originally provided for a holding period of 10 years. 1890 N.D. Sess. Laws, Ch. 23, §5. After vacillating between 10 and five years, the current five-year holding period was adopted. 1905 N.D. Sess. Laws, Ch. 165, §6. The provision for extension of that five years on approval of the State Examiner (now State Banking Commissioner) was added in 1931. 1931 N.D. Sess. Laws, Ch. 96, §15.

But, these banking laws restrict the holding period for real estate for entirely different reasons than the corporate farming law:

> "The purpose of the provisions of Title 12 U.S.C.A. §29 is to prevent speculation in real estate by banks. To permit a bank to deal indiscriminately in real estate as investments, tying up the capital of the bank, might prevent the meeting by the bank of its primary duty to its depositors."

Exchange Bank of Commerce v. Meadors, 184 P.2d 458, 463 (Okla. 1947). The court in *Central National Bank v. Fleetwood Realty Corporation,* 441 N.E.2d 1244 (Ill. App. 1982), at page 1250, was more specific:

> "The limitation on the power of national banks to invest in real estate contained in section 29 was designed to protect bank depositors and stockholders from risky investments."

The North Dakota Supreme Court has also indicated that these types of statutes were intended primarily for the protection of depositors. *Smith v. Rennix,* 204 N.W. 843 (N.D. 1925). *Jarski v. Farmers & Merchants State Bank of Hankinson,* 206 N.W. 773 (N.D. 1925).

Conversely, North Dakota's corporate farming law was not passed because of concern with protecting depositors of banks. Rather, it was an attempt to prevent corporate entities from outside of North Dakota from holding large quantities of North Dakota farmland. McElroy, *North Dakota's Anti-Corporate Farming Act,* 36 N.D.L.Rev. 96 (1960).

It is obvious there is a conflict between the national bank real estate law (12 U.S.C. §29) and the North Dakota anti-corporate farming law (N.D.C.C. 10-06-13(5)), both as to the letter and purpose of the laws. The Respondent (hereinafter "the State") even agreed with this in it's brief below. Where the State does not agree, and it is wrong, is

which law controls in this case. The State contends, and the North Dakota Supreme Court so ruled, that the North Dakota corporate farming law controls and is not preempted by the National Bank Act.

This Court has held that even if Congress has not entirely displaced state regulation over the matter in question, state law is preempted to the extent it actually conflicts with federal law, when it is impossible to comply with both state and federal law or where state law stands as an obstacle to accomplishment of the full purposes and objectives of Congress. *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238 (1984). *Florida Lime and Avocado Growers, Inc. v. Paul*, 373 U.S. 132 (1963). In discussing the latter case, the State indicated below that there is a possibility of complying with both North Dakota law and federal law, just as the Florida Avocado Growers could comply with both state and federal law. In the instant case, we are talking about banks and real estate, not avocados; there is a difference! Sure, there is the possibility of complying with both laws, to the complete frustration of the federal law. This is different than marketing avocados.

It is obvious that Congress has not entirely displaced state regulation over national banks; that is not necessary. But, Congress has spoken and acted on many subjects governing national banks, through the National Bank Act and other statutes. These statutes have been further implemented by the Comptroller of the Currency, the designated regulator for national banks. When Congress has spoken on the subject, and state law conflicts with what Congress passed, federal law will control.

In this case, the state law does stand as an obstacle to accomplishment of the full purposes and objectives of Congress, as stated in *Central National Bank, supra*. Protection of depositors may necessitate holding foreclosed real estate for more than three years. Maybe this is why both federal and state banking laws allow for five years, with the possibility of extension in certain situations. What if there is no market for the land or a forced divestiture of the land would be detrimental to the depositors? The bank regulators are better qualified to determine this than the North Dakota Attorney General.

The State's brief below dwelled on a number of cases where various courts have held that federal law did not preempt state law as applied to national banks. These cases, and several others, are easy to distinguish from the case at hand. Some examples are:

* *In re Certain Moneys, Etc.*, 59 A.2d 154 (Pa. 1948). This case concerned unclaimed property and dormant accounts, a subject on which Congress had not acted. This theme follows throughout many of the other cases. Since Congress had not acted, state law applied and did not conflict with federal law, because there was no federal law.

* *State v. Northwestern National Bank of Minneapolis*, 18 N.W.2d 569 (Minn. 1945). This case again concerned unclaimed property, a subject on which Congress had not acted. It is to be emphasized that the property concerned was depositors' property and not the bank's property as in the instant case. Again, there was no conflict, because there was no federal law on unclaimed property of depositors.

* *National State Bank, Elizabeth, N.J. v. Long*, 630 F.2d 981 (3d Cir. 1980). The court indicated that national banks are subject to state law unless it expressly conflicts with federal law. Congress again had not

acted on the subject of redlining in home lending. Thus, there was no conflict and state law applied.

* *Federal Land Bank of St. Paul v. Lillenhaugen,* 404 N.W.2d 452 (N.D. 1987). Although not involving a national bank, this case also deals with federal preemption. Again, no actual conflict was found in this case, therefore there was no preemption.

Another similar case, cited by the State in its district court brief, concerned setoff law, another subject on which Congress had not acted. In *Biby v. Union National Bank of Minot,* 162 N.W.2d 370 (N.D. 1968), the North Dakota Supreme Court indicated that a national bank will be subject to state law so long as such law does not interfere with the purpose of the bank's creation and does not conflict with federal laws. There was no conflict in that case, as Congress had not acted. The lack of conflict is the key in the above cases and most of the others relied on by the State.

Another case extensively analyzed and relied on by the State in it's brief below is *Omaha National Bank v. Spire,* 389 N.W.2d (Neb. 1986), concerning a national bank challenge to the constitutionality of Nebraska's anti-corporate farming law. Despite the extensive analysis of that case, it really has no relevance to this situation. Nebraska's law provides for a five-year holding period for foreclosed farmland, which is the same as both federal and North Dakota banking laws, thus there was no conflict at that point. The only potential conflict might have been if the bank had asked the Comptroller of the Currency for an extension beyond the initial five years; this had not happened. In fact, it is not clear as to whether the initial five years had actually run. Certain provisions of Nebraska's law may apply to national banks, but no

decision was made as to what would happen in case of a conflict.

A recent case emphasizing that where Congress has acted or spoken on a subject, the federal law will apply, is *Ambro v. American National Bank and Trust Co.*, 394 N.W.2d 46 (Mich. App. 1986). The court indicated that the National Bank Act preempted state law in the area of wrongful discharge and precluded an officer of the national bank from making a breach of employment contract claim for damages against that bank. In this situation, Congress had acted, in the National Bank Act, to specifically cover this subject.

The State appears to be misreading the principles set forth by this Court in *Fidelity Federal Savings and Loan Association v. de la Cuesta*, 458 U.S. 141 (1982), in arguing that this case was improperly applied by the district court. Maybe the facts were not identical, but the language of the Court, at page 153, is instructive:

> "Even where Congress has not completely displaced state regulation in a specific area, state law is nullified to the extent that it actually conflicts with federal law."

The Court then went on to talk about the cases previously cited concerning conflicts and obstacles to the accomplishment of the full purposes and objectives of Congress. After that the Court then stated:

> "These principles are not inapplicable here simply because real property law is a matter of special concern to the States. The relevant importance to the State of its own law is not material when there is a conflict with a valid federal law, for the Framers of our Constitution provided that the federal law must prevail."

This gets to the very heart of the matter. The State cannot deny there is a conflict, thus federal law must prevail.

Two interesting cases, in which state courts have ruled on the effect of state statutes concerning the holding period for real estate owned by national banks, are very relevant to the situation at hand. In *First National Bank v. Commonwealth,* 137 S.W. 518 (Ky. 1911), the Kentucky court stated, at page 520:

> "We think that when a national bank exceeds the purpose of its creation, and goes beyond the scope of its functions as a national banking institution, that the state may deal with such of its transactions as are in excess of the authority conferred by Congress and in violation of the laws of the state, as it would deal with the business or property of any other banking corporation."

Later in the opinion, at page 521, in analyzing the National Bank Act provisions (this was prior to the time Congress allowed for an extension to the holding period by the Comptroller of the Currency) the court stated:

> "In this connection it is important to notice that Congress has provided that national banks shall not hold real estate acquired under mortgage, or to secure debts for a longer period than five years, thereby fixing the same period of limitation as is fixed in the Constitution and statute of the state for the holding of such property by state banks and other corporations.
>
> . . .
>
> "When the five years expires, the protection extended by Congress ends, and then these banks hold lands acquired as those involved in this controversy were, not under the act of Congress, but subject to the laws of the state."

It is important to note that the Kentucky court recognized that the federal law controlled and the state law would only take over after the time period in the federal law had run and the bank was no longer in compliance with that provision of the National Bank Act.

In *National Bank of Commerce v. State*, 368 P.2d 997 (Okla. 1962), the court ruled that statutes providing for recovery by the state of penalties against a corporation for holding real estate in contravention of those state statutes are not in conflict with the National Bank Act and are applicable to national banks. In this case, the holding period allowed was seven years. By the time a national bank would be in violation of the state statute, it would be well beyond the scope of the National Bank Act provisions (the Act at that time did not provide for an extension) and obviously would be in violation of federal law, in addition to the state law. That is much different than the situation in the current case. The Oklahoma court went on to indicate that state law would control where there was no federal statute expressly in conflict with that law. Also in this case, reporting requirements were discussed and made applicable to national banks. This is an area not conflicting with federal law and much different than divestiture requirements.

Much ado has been made by the State because Congress has not expressly preempted state law, or this type of state law, in question, nor does legislative history indicate preemption. This is perfectly understandable when one considers that the National Bank Act was passed in 1864. It is pure speculation whether Congress was concerned about, or even considered, the possibility of state laws such as the one in question; they probably did

not. Just maybe, Congress believed any conflicting state laws that did arise would be preempted. There was really no need to specifically preempt state laws that did not exist. As an example, North Dakota's anti-corporate farming law did not come up until 1932. If Congress were to start over today and enact a new version of the National Bank Act, it is very likely it would have to preempt these state laws because of attacks such as the one being made by the North Dakota Attorney General.

The State, in it's brief below, also wondered why the Comptroller of the Currency, in promulgating certain regulations, did not expressly preempt North Dakota's corporate farming law holding period for foreclosed real estate, especially if it is detrimental to national banks. A simple answer would be that the Comptroller believes, as national banks across the country and the North Dakota Bankers Association do, that the National Bank Act provisions control and there is no need to expressly preempt such law in North Dakota or any of the several states in a similar situation. Until this action was brought against the Bank, the exact question at hand had probably not arisen. Maybe other states either have, in their corporate farming laws, holding periods similar to that in the National Bank Act or have wisely left national banks alone to the Comptroller's regulation. The specific rules talked about in the State's brief below concern national bank real estate lending activities. These affect the safety and soundness of a bank in making loans; the Comptroller, at that time, was not as concerned with foreclosure and the holding period for foreclosed property, which is spelled out in the National Bank Act. In this

context, it is not surprising that the Comptroller did not address this issue.

Legislative intent was also discussed in detail in the State's brief in the district court. Although omitted by the State in its brief on appeal to the North Dakota Supreme Court, it may be pertinent at this time for comment. It was correctly stated that the legislative history of the 1981, 1983, and 1985 corporate farming bills is not conclusive. Any probability as to the intent is pure speculation. The State's district court brief discussed the committee deliberations and legislative intent on HB 1636, considered by the 1985 Legislative Assembly. The real intent of the sponsor, based on personal knowledge and involvement, is that he wanted to prevent any foreclosures at all. The original draft of the bill reduced the three-year holding period to one year, with the reasoning that lenders would not bother to foreclose if they could not hold the land any longer than one year. Also, most of the discussion with the sponsor (much of it not on the record) was concerned with out-of-state insurance companies and, to a certain extent, Federal Land Banks. The sponsor basically indicated he was having no real problem with banks and was not trying to get at banks, only the other lenders. Special frustration was voiced about the Farmers Home Administration. Lobbyists representing banking organizations were noncommittal about HB 1636 on purpose. There was a general belief that it would not apply to commercial banks, either national or state-chartered. That is the reason no strong opposition was expressed! There was also no desire to bring the specific banking law to the attention of the legislators, based on the anti-business mood, and offer them the opportunity to make

any modifications. Likewise, no attempt was made in any of the last several sessions of the Legislature to amend the corporate farming law to exempt banks, as they are already specifically exempt by both federal and state law.

Another issue of concern, not addressed by the State, is who enforces statutes against national banks. The court in *National State Bank, Elizabeth, N.J. v. Long,* 630 F.2d 981 (3d Cir. 1980) was very clear on this issue. It indicated that although national banks were subject to New Jersey's antiredlining statute, enforcement of such statute was the exclusive responsibility of the Comptroller of the Currency, rather than state officials. It's enforcement so directly implicated concerns in the banking field that the appropriate federal regulatory agency had jurisdiction. This principle should also apply in this case. The Attorney General of North Dakota should leave any enforcement in this area to the Comptroller of the Currency and spend his time in other areas of more concern to the state of North Dakota. The Comptroller is the proper person to enforce any laws against national banks, having the expertise available to determine what is proper and necessary for national banks. The Comptroller will not, and has not, ignored the National Banking Act in this regard, but is very concerned about national banks holding real estate longer than absolutely necessary. A Comptroller Interpretive Ruling found at 12 C.F.R. 7.3025(e) is evidence:

> "The bank must maintain current documentation reflecting its continuing and diligent efforts to dispose of each parcel of other real estate owned. Other real estate owned must be disposed of within the holding period permitted by 12 U.S.C. 29 at any time that prudent judgment dictates, but in no event later

> than the end of such holding period. However, if it at any time before the end of the holding period the bank can recover the amount of its original loan plus additional advances and other costs related to the loan or the parcel of other real estate owned, it should promptly dispose of the parcel. . . ."

If the Attorney General of North Dakota spends time on more serious matters, the Comptroller will enforce the National Bank Act in the appropriate situations and accomplish the same end result as desired by the corporate farming law. The State Banking Commissioner will do the same with state-chartered banks. But, it will be done in an orderly manner, by knowledgeable banking regulators, without threat by the North Dakota Attorney General and activist farm groups with the intent of stopping all foreclosures.

North Dakota commercial banks and their farm debtors have been very active in working out their own problems, especially through restructuring loans. If foreclosure is necessary, it is only as a last resort. Banks are not in the business of farming, and do not want to hold farmland any longer than necessary, but have a certain responsibility to their depositors, as well. This entire matter can be taken care of very easily through banking laws and established regulatory procedures. Banking law, not social policy, must control.

It is essential that the Writ be granted. If it is not, this same situation is likely to occur again and again, until ultimately resolved. Further, the precedent set in North Dakota could have dangerous and far-reaching implications on regulation of national banks by the Comptroller of the Currency.

CONCLUSION

For all of the reasons stated herein, the North Dakota Bankers Association, as *amicus curiae*, on behalf of its member banks, hereby respectfully urges the court to grant the Petition for a Writ of Certiorari.

Respectfully submitted,

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